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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Commission Requests Comment,)
Pursuant to *Fresno Mobile Radio, Inc.*)
v. FCC, on the Construction Requirements) FCC 00-95
For Commercial, Wide-Area 800 MHz) PR Docket No. 93-144
Licensees Operating on Non-SMR Channels)
Through Intercategory Sharing)

To: The Commission

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

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To: The Commission

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Pursuant to the March 10, 2000 Public Notice of the Federal Communications Commission ("Commission"),¹ Nextel Communications, Inc. ("Nextel") respectfully submits these Comments regarding regulatory parity and the efficient use of Business and Industrial/Land Transportation ("B/ILT") channels in the 800 and 900 MHz bands.

Specifically, the Commission seeks comment on the appropriate construction requirements applicable to wide-area extended implementation licensees providing Specialized Mobile Radio ("SMR") services on B/ILT channels via intercategory sharing.² Nextel supports the licensee's right to

¹ Public Notice, "Commission Requests Comment, Pursuant to *Fresno Mobile Radio, Inc. v. FCC*, On the Construction Requirements For Commercial, Wide-Area 800 MHz Licensees Operating On Non-SMR Channels Through Inter-Category Sharing," FCC 00-95, PR Docket No. 93-144 ("Public Notice").

² Prior to 1995, the Commission permitted commercial licensees to use B/ILT channels for commercial purposes via the Commission's intercategory sharing rules. Conversely, B/ILT eligibles could license SMR channels for use in their private systems. In December 1995,

choose geographic-area coverage requirements, similar to those available to wide-area extended implementation SMR licenses and Economic Area ("EA") licensees. This will not only provide regulatory parity as required by the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"), but also will encourage more efficient use of spectrum and other resources. A wide-area extended implementation licensee, whether operating on B/ILT channels and/or SMR channels, should have the same flexibility to construct and operate systems that provide service to areas where consumers live and demand service. Requiring licensees to construct and place into service each and every assigned channel at each and every location, as currently required by the Commission's rules, is not in the public interest, wastes valuable resources and does not necessarily improve the quality of telecommunications services offered to the public.

Similarly, the public interest is also harmed by denying B/ILT licensees the right to assign or transfer control of their licenses to commercial users. If the phenomenal growth in demand for a broader range of mobile wireless services is to be satisfied, the Commission must allow B/ILT licensees the flexibility to use their spectrum in the manner that best fulfills their economic and telecommunications needs. This includes the flexibility to sell their licenses to a willing buyer on a voluntary basis in response to marketplace

however, the Commission eliminated the intercategory sharing rule prospectively and thereafter precluded SMR operators from licensing B/ILT channels for commercial use.

forces – as recently proposed by Chairman Kennard.³ As he recently put it, “[w]e will head off a spectrum drought if we build on the success of the past: expanding on the market-based approaches of the last decade; finding more ways to create a fluid market in spectrum.”⁴ The current unwarranted limitation on use of B/ILT spectrum at both 800 MHz and 900 MHz is a restriction that exacerbates the growing spectrum shortage in the U.S. By allowing voluntary alienation of B/ILT licenses to both commercial and private users, the Commission has an opportunity to ease this particular spectrum shortage, allow the marketplace to work and ensure that the spectrum is used efficiently.⁵ At the same time, because such transactions would be strictly voluntary, the Commission would be protecting the interests of those B/ILT licensees with no economic or other incentive to sell their spectrum.

II. BACKGROUND

The Commission’s Public Notice herein is based on its decision in the December 23, 1999 Memorandum Opinion and Order on Remand in PR

³ See, e.g., “Wire Less Is More,” An Address by Chairman William E. Kennard, Federal Communications Commission to the Cellular Telecommunications Industry Association, New Orleans, Louisiana, February 28, 2000.

⁴ *Id.*

⁵ At present, a significant majority of the B/ILT channels are in commercial use – demonstrating a demand for these channels for providing commercial services to the public. According to the Commission’s licensing database, of the 12,410 800 MHz Business category frequencies licensed between January 1, 1996 and late 1998, 6,911 --**fifty-six percent**-- were licensed for commercial/SMR operation. During the same time period, the Commission licensed 18,844 800 MHz Industrial/Land Transportation frequencies, with 16,235 --**eighty-six percent**-- authorized for commercial/SMR use.

Docket No. 93-144.⁶ Therein, the Commission gave wide-area SMR extended implementation licensees the option of complying with the same geographic-area based construction requirements that are applicable to EA SMR licensees instead of site-by-site construction requirements. The Commission reached this conclusion on remand of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Fresno Mobile Radio, Inc. v. FCC*.⁷ The Court found that wide-area extended implementation SMR licensees and EA SMR licensees provide substantially similar services and therefore, pursuant to OBRA '93, are entitled to similar buildout requirements.⁸

In the Remand Order, however, the Commission did not extend these geographic-area buildout requirements to wide-area extended implementation SMR licensees operating on B/ILT channels via intercategory sharing. In the Public Notice, the Commission seeks comment on whether these licensees, operating commercial systems in whole or in part on B/ILT channels assigned for commercial use through intercategory sharing, should have the same geographic-area based buildout requirements available to extended implementation licensees operating on SMR channels.

⁶ Memorandum Opinion and Order on Remand, FCC 99-399, released December 23, 1999 ("Remand Order").

⁷ *Fresno Mobile Radio, Inc. et al. v. Federal Communications Commission*, 165 F.3d 965 (D.C.Cir., Feb. 5, 1999) ("*Fresno*").

⁸ *Id.* at 969.

III. DISCUSSION

A. **Regulatory Parity Requires That the Commission Apply Geographic-Area Buildout Requirements on Wide-Area Extended Implementation Licensees Operating on B/ILT Channels.**

In 1993, Congress adopted OBRA '93 which required, among other things, that the Commission "modify its rules, to the extent `necessary and practical,'" to ensure that substantially similar wireless services would be "subject to `comparable' technical requirements."⁹ In *Fresno*, the Court concluded that extended implementation and EA SMR licensees are entitled to similar construction requirements because each licensee provides substantially similar services.¹⁰ Continuing to apply site-by-site construction requirements on extended implementation licensees, the court concluded, resulted in a "permanent advantage" for the EA licensees. According to the court: "An EA licensee will never have to provide service to more than two-thirds of its market, while a wide-area incumbent offering the same service will be required to cover its entire service area within two years."¹¹ These construction requirements, the court concluded, provided EA licensees "a permanent advantage over incumbent SMR licensees. . . ."¹²

⁹ *Id.* at para. 80; Pub. L. No. 103-66, Section 6002(d)(3)(B), 107 Stat. 312 (1993).

¹⁰ *Fresno* at 969.

¹¹ *Id.*

¹² *Id.*

Just as an extended implementation licensee operating on SMR channels is providing services similar to and competitive with EA licensees' services, an extended implementation licensee operating on B/ILT channels can also provide services that compete with EA SMR licensees. The services provided by wide-area extended implementation SMR licensees, whether using SMR or B/ILT channels, are similar to those provided by SMR EA licensees in that they all are providing commercial services, with similar, if not identical, system architecture to compete with cellular and Personal Communications Services ("PCS") providers. As a result, regulatory parity requires that all of these licensees be subject to similar buildout requirements.

B. The Commission Should Further its Spectrum Flexibility Policy Goals By Enabling More Efficient Use of B/ILT Frequencies.

Providing construction parity for wide-area extended implementation licensees operating B/ILT frequencies via intercategory sharing is not the only regulatory change necessary to enhance competition in the wireless marketplace and ensure the most efficient use of this scarce public resource. The Commission has expressed concern over the growing shortage of spectrum to meet the increasing demand for a broad array of wireless services.¹³ This concern applies especially to the 800 MHz and 900 MHz

¹³ See, e.g., Second Report and Order, FCC 00-90, released March 9, 2000 at para. 31 ("...enabling a 'free market' in spectrum to develop could have significant public interest benefits in ensuring **the limited spectrum resource** is used efficiently. . .")(emphasis added); Policy Statement, FCC 99-354, released November 22, 1999 at para. 2 ("...demand for spectrum has increased dramatically as a result of explosive growth in wireless communications. . .[and] the Commission's spectrum management activities must focus on allowing spectrum markets to become more efficient and increasing the amount of spectrum available for use.")

B/ILT frequencies, currently set aside for limited use by private licensees, just as it applies to any cellular, PCS or other Commercial Mobile Radio Services spectrum. As with those other spectrum blocks, there are 800 and 900 MHz B/ILT licensees that do not want or need all of their current spectrum assignments. At the same time, there are "willing buyers" for this spectrum who would like to put the B/ILT channels into commercial systems that are providing a broadening array of wireless telecommunications services to an increasingly demanding consumer. The Commission should permit these transactions to occur.

Given that there are willing buyers and willing sellers of B/ILT spectrum -- in various places and for various terms -- Nextel believes that the Commission has an important opportunity to enact its new spectrum policies to permit more flexible use of this spectrum.¹⁴ Increased flexibility would permit B/ILT licensees to seek out interested buyers and sellers, freely and voluntarily assign or transfer their B/ILT spectrum to any interested party, and thereby allow the marketplace to respond more readily to existing spectrum needs than is possible under current restrictive regulations. Allowing the marketplace to make these decisions, as Chairman Kennard has recognized, is critical to efficient spectrum use and meeting the growing

¹⁴ The Commission has an open proceeding that currently is considering these very issues, and therefore has the opportunity to act expeditiously on these innovative spectrum policy changes. See Notice Of Proposed Rulemaking, WT Docket No. 99-87 ("BBA '97 Proceeding"), released March 25, 1999.

demand for spectrum.¹⁵ Chairman Kennard, noting that “spectrum is the life-blood of [the wireless telecommunications] business,” stated that the Commission should “redouble [its] efforts to manage the spectrum resource in ways that make more spectrum available.”¹⁶

The Commission’s open BBA ’97 Proceeding affords an ideal opportunity to do just that. Chairman Kennard’s challenge can be met, in part, by permitting B/ILT licensees to evaluate offers for their spectrum and enter into transactions that meet their needs. Not only does this permit more efficient spectrum management, but it also empowers B/ILT licensees to unlock the true economic value of their licenses to fund their participation in advanced communications systems. Spectrum management that curtails the use of spectrum by limiting it to pre-defined uses is outdated, inconsistent with the needs of the 21st Century wireless marketplace, inconsistent with recent Commission actions,¹⁷ and not in the public interest. If an existing B/ILT licensee places the highest value on its current spectrum use, there is nothing in Nextel’s proposal that would prevent it from continuing to operate on those channels. However, if that licensee decides

¹⁵ See “Wire Less Is More,” *supra* at footnote 3.

¹⁶ *Id.*

¹⁷ In its recent Second Report and Order in WT Docket No. 99-168, released March 9, 2000, the Commission used an “innovative spectrum management approach” by establishing a new “Guard Band Manager” licensee to permit flexible use of certain 700 MHz channels that are being reallocated from broadcasting. Guard Band Order at para. 30. The Guard Band Manager approach, the Commission further concluded, should help it advance a free market approach to spectrum management. *Id.* at para. 31.

that the spectrum is worth more to another party and seeks to sell its spectrum – just as the marketplace exchanges any other commodity that is in significant demand -- the Commission should allow the marketplace to function and thereby “encourage secondary markets for spectrum.”¹⁸

Buyers and sellers of B/ILT spectrum should be allowed to undertake those business transactions because they foster the public interest.

In the case of B/ILT spectrum at 800 MHz and 900 MHz, this Commission encouragement should come in the form of full alienability of B/ILT licenses. By allowing B/ILT licensees the opportunity to sell their spectrum to willing buyers – particularly commercial providers in need of spectrum to meet increasing demand for service – the Commission can encourage a secondary spectrum market and promote more efficient spectrum use. At the same time, the Commission would be protecting the interests of B/ILT licensees because those uninterested in selling their spectrum would have no obligation to do so.

¹⁸ “Wire Less is More,” *supra*.

IV. CONCLUSION

For the reasons discussed herein, Nextel supports the establishment of geographic-area buildout requirements for wide-area extended implementation B/ILT licensees and the elimination of eligibility requirements for B/ILT licenses that currently preclude the highest and best use of this scarce resource. Both changes would promote competition in the CMRS marketplace and would further promote efficient spectrum use.

Respectfully submitted,

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By, 

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Date: March 27, 2000

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 27th day of March 2000,
caused a copy of the attached Comments of Nextel Communications, Inc.
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A handwritten signature in black ink, reading "Rochelle L. Pearson". The signature is written in a cursive style with a large initial "R" and a long, sweeping underline.

Rochelle L. Pearson